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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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OCTOBER TERM, 1920.

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SAMUEL C. PANDOLFO,	}	No. 3589.
Plaintiff in Error,		
vs.		
BANK OF BENSON, a Corporation,		
et al.,	}	
Defendants in Error.		

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In Error to the District Court of the United States within  
and for the District of Arizona, at Phoenix.  
Honorable David P. Dyer, District Judge.

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## BRIEF OF PLAINTIFF IN ERROR.

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JONES, HOCKER, SULLIVAN & ANGERT,  
Counsel for Plaintiff in Error.

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**BRIEF OF PLAINTIFF IN ERROR.**

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**STATEMENT.**

This is an action for libel instituted by plaintiff in error against the defendants, which are banking corporations of the State of Arizona, and members of

the Arizona Bankers' Association, except the individual defendant, Morris Goldwater, who was the secretary of said Arizona Bankers' Association.

The original petition in this case was filed in the United States District Court within and for the District of Arizona, at Phoenix, on January 6, 1919. On April 14, 1919, an amended petition was filed in said cause, which (omitting caption and signatures) is as follows, to wit:

### **Amended Petition.**

“Comes now the said plaintiff with leave of the Court first had, and files this, his amended petition, and alleges:

“That the plaintiff is a citizen of the State of Minnesota, residing in the County of Stearns, in said State.

“That the defendants, Bank of Benson, Bank of Bisbee, Citizens Bank & Trust Co., Miners & Merchants Bank, Buckeye Valley Bank, Casa Grande Valley Bank, Bank of Chandler, Bank of Duncan, Bank of Douglas, Arizona Central Bank, The Citizens Bank, Glendale State Bank, Security State Bank, Pinal Bank & Trust Co., Old Dominion Com. Co., Merchants & Stock Growers Bank, Holbrook State Bank, Bank of Jerome, Bank of Lowell, Mesa City Bank, Salt River Valley Bank, State Bank of Metcalf, Bank of Miami, Gila Valley Bank & Trust Co., State Bank of Morenci, Santa Cruz Valley Bank & Trust Co., Sonora Bank & Trust Co., Bank of Oatman, The Commercial Bank, Payson Com. & Trust Co., Central Bank of Phoenix, Citizens State Bank, Phoenix Savings Bank & Trust Co., Valley Bank, Bank of Arizona, Commercial Trust & Savings Bank, Yavapai County Savings Bank,

Bank of Safford, St. Johns State Bank, San Simon Valley Bank, Bank of Northern Arizona, Bank of Superior, Farmers & Merchants Bank, Citizens Bank, Merchants Bank & Trust Co., Southern Arizona Bank & Trust Co., Willecox Bank & Trust Co., Williams State Bank, Bank of Winslow and Arizona State Bank, are all banking corporations organized under the laws of the State of Arizona and citizens of said State, with their respective offices and places of business at the cities of Benson, Bisbee, Bisbee, Bisbee, Buckeye, Casa Grande, Chandler, Duncan, Douglas, Flagstaff, Flagstaff, Glendale, Glendale, Florence, Globe, Holbrook, Holbrook, Jerome, Lowell, Mesa, Mesa, Metcalf, Miami, Morenci, Morenci, Nogales, Nogales, Oatman, Parker, Payson, Phoenix, Five Points, Phoenix, Phoenix, Phoenix, Prescott, Prescott, Prescott, Safford, St. Johns, San Simon, Snowflake, Superior, Tempe, Thatcher, Tucson, Tucson, Willecox, Williams, Winslow and Winslow, in the State of Arizona.

“The defendants, First National Bank of Clifton, First National Bank of Globe, First National Bank of Douglas, First National Bank of Nogales, National Bank of Arizona, Phoenix National Bank, Prescott National Bank, Tempe National Bank, First National Bank of Tombstone, Arizona National Bank, Consolidated National Bank, First National Bank of Yuma and Yuma National Bank, are banking corporations organized under the laws of the United States, conducting their respective banking businesses at the cities of, respectively, Clifton, Globe, Douglas, Nogales, Phoenix, Phoenix, Prescott, Tempe, Tombstone, Tucson, Tucson, Yuma and Yuma, in the State of Arizona, and are all citizens of said

State, and that the defendant Morris Goldwater is a resident of the City of Prescott, in the State of Arizona, and a citizen of said State.

“Plaintiff states that at all the times herein-after mentioned, and long prior thereto, the defendants were, and now are, banking corporations, duly organized and existing as aforesaid, and, as such, have long prior to the matters hereinafter referred to heretofore organized themselves into and at all the times herein mentioned, and now, conduct and operate a voluntary association known as the Arizona Bankers’ Association, of which all the defendants, at all the times hereinafter mentioned, and long prior thereto, were members, except the defendant Morris Goldwater, who is an individual and who at all the times hereinafter mentioned and long prior thereto was, and now is, the secretary of said Arizona Bankers’ Association.

“Plaintiff further states that said defendants, under said style of Arizona Bankers’ Association, were and are engaged in the business of printing and publishing a certain book and pamphlet called ‘Proceedings of the Arizona Bankers’ Association’, and that said defendant Morris Goldwater, as the secretary of said Arizona Bankers’ Association, knowingly acted with the said Arizona Bankers’ Association in printing and publishing and distributing the said book and pamphlet so printed and published containing said proceedings of said Arizona Bankers’ Association, to the public.

“That said book and pamphlet was at all such times printed and published yearly by said Arizona Bankers’ Association, assisted by Morris Goldwater, defendant, and was by them largely circulated throughout the states of Arizona, Texas, New Mexico, California and Illinois, and

particularly throughout the entire states of Arizona and New Mexico, where the plaintiff is well known, and throughout the United States of America generally, and was widely read by bankers and business men generally.

“Plaintiff states that he has at all times conducted and demeaned himself as an honest and upright citizen of the United States of America, and of the states of New Mexico, Texas and Minnesota, where he had resided during the past few years; that ever since the ..... day of ....., 1917, he has been employed as the president of the Pan Motor Company, an automobile manufacturing company organized and existing under and by virtue of the laws of the State of Delaware, and having its principal office in the City of St. Cloud, in the State of Minnesota.

“Plaintiff further states that until the commission of the several grievances by the defendants hereinabove set forth he was well reputed, esteemed and accepted by and among his neighbors and acquaintances to whom he was known throughout the states hereinbefore mentioned, and throughout the United States, as a person of good name, fame and credit and as a business man and a corporation officer of honesty, integrity and fidelity.

“And plaintiff alleges that defendants, well knowing such fact, and intending, wickedly and maliciously, to injure the plaintiff in his good name, fame and credit as an individual and as a business man and corporation officer, and as such, to bring him into public hatred, scorn, ridicule, contempt, infamy and disgrace, and to deprive him of the benefits of public confidence, and to cause it to be believed by his business associates and among good and worthy citizens of the

United States that plaintiff had been guilty of corrupt, dishonest, dishonorable and criminal conduct in and about the discharge of his duties as a corporation officer and in and about the transaction of financial matters and as a business man, and in the transaction of insurance business in the State of Texas (in which he had been previously employed); and in order to cause it to be believed by said hereinbefore mentioned persons that the plaintiff had been guilty of criminal conduct and practices, of embezzlement and theft, and obtaining money under false pretenses in and about the transaction and discharge of financial matters; and in order to cause it to be believed by said persons hereinbefore mentioned, and the public generally, that the plaintiff had been guilty of a violation of the criminal laws of the states of Texas, New Mexico and Arizona, and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money under false pretenses and of violating the insurance laws of the State of Texas, by directly or indirectly unlawfully taking, receiving or retaining moneys legally belonging to other persons, and of writing insurance in the State of Texas in violation of the law; and intending to vex, oppress, impoverish and wholly ruin the plaintiff, did, on or about the ..... day of May, 1918, in Vol. X of the book or pamphlet known as the 'Proceedings of the Arizona Bankers' Association', publish and cause and procure to be published of and concerning the plaintiff a certain false, wicked, malicious, defamatory and libelous article, as follows, to wit:

“ ‘The Secretary: Mr. President, before you take up any other matters, I have a letter here that I want to read. This is a letter

addressed to the Secretary of the Arizona Bankers' Association and also to the Secretary of the New Mexico Association. It says: "Mr. Morris Goldwater, Secretary State Bankers' Association, Prescott, Arizona. Mr. J. C. Christensen, Secretary Bankers' Association, Raton, New Mexico.

Gentlemen: You have operating in Arizona and New Mexico one Mr. S. C. Pandolfo, who recently moved from San Antonio. I am writing you, gentlemen, with reference to this man Pandolfo, as he is a double-barreled crock. The Commissioner of Insurance of Texas revoked his license outright and refused him the privilege of writing insurance in Texas on account of him continuously violating the law. Our Banking Commissioner forbade state banks from buying paper from this fellow, or in any manner taking obligations in which he was interested.

He has crooked more people and in more ways than most any fellow we have ever had in this part of the country in a long time. I believe that it is only just to the bankers in your state that you tip them off to this fellow. If you do not he is certainly going to hang a lot of them before he is found out. He is one of the crookedest white men I have ever seen. His present address, I understand, is at Tuenmeari, and he is promoting some kind of an Automobile Insurance Company, the results of which that he will be getting a lot of money out of the promotion, and the company will be broke about the time it shall begin its operation.

Yours very truly,

President."

It is such a letter that I did not care to put it in print and send it out as a warning, as I did not know but what I might be held up and libeled for something, so I thought I would read it here to you all.' ”

“And, having so published said false, defamatory and libelous matter of and concerning the plaintiff, the defendants circulated the same, and caused it to be circulated among business men, bankers and others throughout the States of Arizona, Texas, New Mexico, California, Illinois and other States of the United States.

“Plaintiff alleges that the defendants well knew that said statements so published of and concerning the plaintiff, as aforesaid, were absolutely false and untrue, and that the same were published with the malicious and express intent of defaming and injuring the plaintiff.

“Plaintiff further says that said book and pamphlet in which said libelous article was so published as aforesaid is a book and pamphlet of large circulation, as hereinbefore alleged, and is generally considered of great influence and power among banking institutions throughout the United States of America, and that the defendants, the publishers of said book and pamphlet, are reasonably worth more than fifty million dollars (\$50,000,000.00).

“Wherefore, plaintiff says that, by reason of the premises, he has been brought into public hatred, scorn, ridicule, contempt, infamy and disgrace; has been deprived of the benefits of public confidence, both as an individual and as a corporate employe and officer; has suffered great humiliation and mental pain and anguish, and has grievously suffered in his reputation, and has been damaged by the libelous publication so made

of and concerning him by the defendants, as aforesaid, in the sum of five hundred thousand dollars (\$500,000.00) as actual damages, and in the further sum of five hundred thousand dollars (\$500,000.00) as punitive damages, for which he prays judgment, with his costs.”

Thereafter, in due time, the defendants filed their separate motions to strike out portions of plaintiff’s said amended petition and separately demurred to said petition upon the ground that the same wholly failed to state facts sufficient to constitute a cause of action; which said motions to strike and demurrer are as follows (caption omitted):

“Come now the defendants named in the complaint herein, by their attorneys, Armstrong, Lewis & Kramer, and severing as to their defense, separately plead to the complaint of plaintiff herein, as follows:

### **Motions to Strike.**

#### **I.**

“Each defendant moves the Court to strike from line 24, page 5 of the complaint, the words ‘criminal conduct’ as surplusage.

#### **II.**

“Each defendant further moves the Court to strike from the complaint the following words in lines 30, 31 and 32, page 5, and line 1, page 6, of the complaint, to wit, ‘criminal conduct and practices of embezzlement and theft, and obtaining money under false pretenses in and about the transaction and discharge of financial matters’ as surplusage.

III.

“Each defendant further moves the Court to strike from the complaint the following words in lines 2, 3 and 4, page 6 of said complaint, to wit: ‘that the plaintiff had been guilty of the violation of the criminal laws of the States of Texas, New Mexico and Arizona’ as surplusage.

IV.

“Each defendant further moves the Court to strike from the complaint the following words found in lines 4, 5 and 6, page 6 of said complaint, to wit: ‘and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money under false pretenses’ as surplusage.

V.

“Each defendant further moves the Court to strike from the complaint the following words found in lines 7, 8 and 9, page 6 of said complaint, to wit: ‘by directly or indirectly unlawfully taking, receiving or obtaining moneys legally belonging to other persons’ as surplusage.”

**DEMURRER.**

“Without waiving said motions, each defendant separately demurs to said complaint upon the ground that said complaint wholly fails to state facts sufficient to constitute a cause of action as against it.

“Wherefore, each defendant prays that said complaint be dismissed as to it and that it recover its costs.”

Thereafter, on March 9, 1920, the separate demurrers and motions to strike filed by the defendants

came on for hearing in the United States District Court within and for the State of Arizona, at Phoenix, before Honorable David P. Dyer, Judge, and, after being duly argued and submitted, the Court duly sustained said demurrers and motions to strike, and struck out of plaintiff's amended petition the parts against which the defendants had moved, and also held that plaintiff's petition wholly failed to state any cause of action against the defendants.

Thereafter, plaintiff declining to plead further, final judgment was rendered dismissing the plaintiff's petition for the reason that the same wholly failed to state any cause of action and entering final judgment in favor of the defendants. From this final judgment the plaintiff duly sued out his writ of error to this Court and the cause as now pending in this Court involves simply the propriety of the action of the District Court in striking out portions of plaintiff's amended petition and in holding that plaintiff's amended petition wholly failed to state a cause of action against the defendants.

## ASSIGNMENTS OF ERROR RELIED ON.

The errors of the United States District Court within and for the State of Arizona, relied upon by the plaintiff in error, are the following:

1. The Court erred in sustaining the motions to strike of the defendants below the following words from plaintiff's petition as surplusage, to wit:

(a) From line 24, page 5, "criminal conduct".

(b) From lines 30, 31 and 32, page 5, and line 1, page 6, "criminal conduct and practices of embezzlement and theft and obtaining money under false pretenses in and about the transaction and discharge of financial matters".

(c) From lines 2, 3 and 4, page 6, "that the plaintiff had been guilty of the violation of the criminal laws of the State of Texas, New Mexico and Arizona".

(d) From lines 4, 5 and 6, page 6, "and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money under false pretenses".

(e) From lines 7, 8 and 9, page 6, "by directly or indirectly unlawfully taking, receiving or obtaining money legally belonging to other persons".

2. The Court erred in sustaining the demurrer of the defendants below to the petition of the plaintiff below and plaintiff in error herein.

## POINTS AND AUTHORITIES.

### I.

The District Court erred in sustaining defendants' motions to strike out parts of plaintiff's amended petition and in holding that the parts stricken out were surplusage.

Cyc, Vol. XXV, page 452;

Morrison v. Smith et al., 69 N. E. 725, 42 N. Y. Suppl. 681;

White v. Parks et al., 93 Ga. 633, 20 S. E. 78.

### II.

The trial court erred in sustaining defendants' demurrer to plaintiff's amended petition and in holding that plaintiff's amended petition wholly failed to state any cause of action as against defendants.

(a) A member of a voluntary association is responsible for the tortious acts committed by the association when it can fairly be assumed that they were within the scope of the purposes for which the organization was formed.

4 Cyc, 312, 313;

25 Am. & Eng. Ency. of Law, page 1138;

White v. Parks, 93 Ga. 633, 20 S. E. 78;

Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123,  
9 L. R. A. 86;

Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L.  
R. A. 803, 76 Am. St. Rep. 746;

Weston v. Barnicoat, 175 Mass. 454, 49 L. R. A.  
613;

Vredenburg v. Behan, 33 La. Ann. 627;

Davison v. Holden et al., 55 Conn. 103, 10 Atl.  
515;

Connell v. Stalker, 21 Misc. (N. Y.) 609;  
Simmonds v. Southern Rifle Club, 52 La. Ann.  
114;  
April v. Baird, 32 N. Y. App. Div. 226;  
McDowell v. Joice, 149 Ill. 124;  
Coleman v. Coleman, 78 Ind. 344;  
Lynch v. Postlethwaite, 7 Mart (La.) 69, 12  
Am. Dec. 495;  
Taft v. Ward, 106 Mass. 518;  
Machinists National Bank v. Dean, 124 Mass.  
81.

(b) In the absence of a statutory provision, suits against voluntary associations should be brought against the individual members, whether individuals or corporations.

Davison v. Holden et al., 55 Conn. 103, 10 Atl.  
515;  
State ex rel. Attorney-General v. Kansas City  
Live Stock Exchange et al., 109 S. W. 675;  
American Steel Co. v. Wire Drawers Union,  
90 Fed. 598.

(c) The assent of members of a voluntary association may be presumed where the act committed is in furtherance of the common purpose or object of the association.

5 Corpus Juris 1364, Note 30, Subdivision C.

(d) Demurrer will not lie against a complainant because it fails to allege that the words complained of were uttered by authority of the corporation, or that the utterances were subsequently ratified.

Vol. V, Fletcher's Cyclopedia Corporations,  
page 5245.

## ARGUMENT.

The sole question to be reviewed upon this writ of error is the action of the trial court in striking out portions of plaintiff's amended petition and in sustaining the demurrer to plaintiff's amended petition, for the reason that the same was held by the trial court not to state any cause of action as against the defendants, or any of them.

### I.

#### Motions to Strike.

Defendants' motions to strike certain allegations of plaintiff's petition were based on the ground that the matter sought to be eliminated from the amended petition is unnecessary innuendo, but we contend were not well taken, and should have been overruled by the trial court.

Defendants, in support of their motions to strike, in the trial court, cited 25 Cyc 452, where it is said:

“The innuendo may be treated as surplusage where it is used in connection with **words which are unequivocal** and actionable *per se*, and it is held that where plaintiff in an action has, by innuendo, put a meaning upon the alleged defamatory publication which is not supported by its language or proof, the Court may nevertheless submit the case to the jury, if the publication is defamatory *per se*. But where the communication is not actionable *per se*, and the innuendo is used to impute a defamatory meaning, plaintiff is bound by the construction which he has given to the words in the innuendo.”

It is difficult to see where the above ruling, if observed, warrants the striking out of the language in the petition, or, in other words, the innuendo which is sought to be stricken. The gist of the matter complained of in the petition is a letter addressed to the secretary of the defendants' association which was read to the association and by officers of the association caused to be published in the volume of that year's proceedings of the association. The letter is set out in the petition, and in effect says:

“I am writing you, gentlemen, with reference to this man Pandolfo as he is a double barrelled **crook**. \* \* \* He has **crooked** more people and in more ways than most any fellow we have ever had in this part of the country in a long time. \* \* \* He is one of the **crookedest** white men I have ever seen.”

The word “crook” used in the letter has various meanings (Mr. Webster defines it “a person given to fraudulent practices, an accomplice of thieves, forgers, etc.), and needs explanation as to what the writer of the letter intended to imply by its use, and, therefore, it was and is proper for the plaintiff in using the innuendo in his petition which he deemed the words “crook” and “crooked” used meant, to characterize the particular kinds of dishonesty that the terms “crook” and “crooked” implied.

The New York Court of Appeals, in the case of *Morrison v. Smith et al.*, 69 N. E. 725, passing on the use of innuendo in a petition for libel upon an article libelous *per se*, held where an article is libelous *per se* the case should be submitted to the jury, though

plaintiff has by innuendo put a meaning on the alleged libelous publication which is not supported by its language or proof.

Also, to the same effect, see

White v. Parks et al., 20 S. E. 78;  
Cyc, Vol. XXV, page 452.

In view of the foregoing rule and authorities, the motions to strike ought to have been denied.

## II.

### DEMURRER.

As to the demurrer of the defendants, which is general and by which all of the plaintiff's allegations in his amended petition, which are well pleaded, are admitted, we respectfully submit that the demurrer is not well taken, and should have been overruled.

The demurrer and the ruling of the trial court seem to be based upon a misapprehension of the allegations of the amended petition. The amended petition does not charge a copartnership to exist between the defendants, but merely a voluntary association composed of various corporations, among its objects and purposes being to print and publish a book or pamphlet called "Proceedings of the Arizona Bankers' Association". The amended petition expressly charges that the defendants, under the name of the Arizona Bankers' Association, were engaged in the business of printing and publishing a certain book or pamphlet called the "Proceedings of the Arizona Bankers' Association", and in which book or pamphlet the libelous article is contained and published.

Under such circumstances a member of a voluntary

association is responsible for the tortious acts committed by the association when it can fairly be assumed that they were within the scope of the purposes for which the organization was formed.

- 4 Cyc 312;
- 25 Am. & Eng. Encyc. of Law, page 1138;
- White v. Parks, 93 Ga. 633, 20 S. E. 78;
- Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123,  
9 L. R. A. 86;
- Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L.  
R. A. 803;
- Vredenburg v. Behan, 33 La. Ann. 627;
- Davison v. Holden et al., 55 Conn. 103, 10  
Atl. 515;
- Weston v. Barnicoat, 175 Mass. 454, 49 L. R.  
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- Connell v. Stalker, 21 Misc. (N. Y.) 699;
- Simmonds v. Southern Rifle Club, 52 La. Ann.  
114;
- April v. Baird, 32 N. Y. App. Div. 226;
- McDowell v. Joice, 149 Ill. 124;
- Coleman v. Coleman, 78 Ind. 344;
- Lynch v. Postlethwaite, 7 Mart (La.) 69, 12  
Am. Dec. 495;
- Taft v. Ward, 106 Mass. 518;
- Machinists National Bank v. Dean, 124 Mass. 81.

In the absence of statutory provisions, suits against voluntary associations should be brought against the individual members, whether individuals or corporations.

- Davison v. Holden et al., 55 Conn. 103, 10  
Atl. 515;
- State ex rel. Attorney-General v. Kansas City  
Livestock Exchange et al., 109 S. W. 675;
- American Steel Co. v. Wire Drawers Union, 90  
Fed. 598.

The assent of members of a voluntary association may be presumed where the act committed is in furtherance of the common purpose or object of the association.

5 Corpus Juris 1364, Note 30, Subdivision C.

In this case one of the common purposes of the defendants' association was to publish the book in which the libelous article was contained and published.

Demurrer will not lie against a declaration because it fails to allege that the words complained of were uttered by authority of the corporation, or that the utterances were subsequently ratified.

Vol. V, Fletcher's Cyclopedia Corporations,  
page 5245.

There is nothing which appears on the face of the amended petition in this case that shows or could be construed to show that the libelous article is a privileged communication, and therefore we deem it unnecessary to answer defendants' argument advanced in the trial court on that point of their demurrer.

For all of the reasons above enumerated, we earnestly insist that the District Court erred in sustaining defendants' motions to strike out parts of plaintiff's amended petition, and in sustaining the defendants' demurrer and holding that plaintiff's amended petition wholly failed to state any cause of action against the defendants. For these reasons the Court erred in rendering final judgment in favor of the de-

fendants, and the judgment should, therefore, be reversed and the cause remanded so that a trial thereof may be had.

Respectfully submitted,

JONES, HOCKER, SULLIVAN & ANGERT,  
Counsel for Plaintiff in Error.